No. 90-368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHELDON BARUCH TOIBB,
Petitioner,

v.

STUART J. RADLOFF, TRUSTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether individuals are barred under Section 109(d) of the Bankruptcy Code from reorganizing under chapter 11 unless they are engaged in business.

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BRIEF FOR PETITIONER

STATEMENT OF FACTS

Petitioner is an individual who sought relief under Title 11, chapter 11 of the United States Bankruptcy Code [1] because he believed that a reorganization offered him and his creditors more value than his only alternative, liquidation under chapter 7.[2] The courts below dismissed his petition, holding that, because petitioner had

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[1] 11 U.S.C. § 1101 *et seq.* (1988). All chapter and section references are to Title 11 of the United States Code (the "Bankruptcy Code" or "Code") unless otherwise indicated.

[2] 11 U.S.C. § 701 *et seq.* (1988).

no business, he could not proceed under chapter 11. The issue presented is whether chapter 11 is open to any "person," as provided in section 109(d) of the Bankruptcy Code, or whether chapter 11 is closed to individuals not engaged in business notwithstanding their ability to effectuate a plan of reorganization and reorganize successfully.

Petitioner is a licensed attorney who had gained expertise as an energy lawyer from March 1980 until September 1981 at the Federal Energy Regulatory Commission ("FERC").[3] Upon leaving FERC, he wrote a business plan to create an independent hydroelectric generation company and successfully marketed the plan to two independent investors. J.A. 128-132. In 1983, these investors formed Independence Electric Corporation ("IEC"). J.A. 96, 131-32. In exchange for his business plan, petitioner received 24% of the stock of IEC. *Id.* The two investors received the remaining 76% of IEC's stock. J.A. 96, 132. At the time, petitioner and IEC also signed a consulting agreement. Petitioner expected his consultancy to IEC to continue indefinitely. J.A. 132-38. Petitioner's consultancy to IEC continued, however, only until April 1985, when his agreement was terminated. He retained counsel, claiming that his consulting had been terminated in violation of the terms of the agreement, and seeking to protect his stock interest. J.A. 136-38.

In the summer of 1986, petitioner came to believe that the two other IEC investors had abandoned the company and thus that IEC's stock was worthless. J.A. 141-42. Accordingly, in November 1986, having debts which exceeded what he believed to be the value of his one significant established asset, the IEC stock, petitioner filed for protection under chapter 7 of the Bankruptcy Code

[3] Joint Appendix ("J.A."), at 128-29, 162. Citations to "Pet. App." are to the Appendix to Petition for Certiorari.

and a trustee was appointed to liquidate petitioner's estate.[4] Chapter 7 of the Bankruptcy Code permits a debtor to liquidate its assets for distribution to creditors. The chapter does not contemplate the continued operation of the debtor's business for more than a limited period.[5]

In 1987, after filing his chapter 7 petition, petitioner's belief about the value of his bankruptcy estate changed. Petitioner testified that in 1987 he learned that IEC's majority shareholders had not abandoned the company and had successfully pursued applications to FERC for licenses to construct and operate hydroelectric power plants.[6] He also concluded that he had causes of action against the majority IEC shareholders for "an improper attempt to squeeze [petitioner] out [of IEC] and for breach of fiduciary duty in connection with their activities after the formation of IEC." J.A. 115; *see also* J.A. 110, 142-43.

In the summer of 1987, at or about the time FERC first granted a license to IEC, the Board of Directors of IEC offered to purchase petitioner's stock for $25,000. The trustee sought to accept the offer and notified creditors that he would sell the stock absent a valid objection to the sale. J.A. 13-14. Thereafter, on September 21, 1987, petitioner filed a petition in the bankruptcy court to convert his case to a case under chapter 11 of the Bankruptcy Code, the chapter permitting debtors to avoid liquidation by reorganizing under a plan confirmed by the bankruptcy court. J.A. 15-16. Petitioner also objected to the sale of stock as the chapter 7 trustee had proposed, arguing that the sale would be unfair and inequitable and urging that he should be permitted an opportunity to reorganize his affairs under chapter 11. J.A.

[4] 11 U.S.C. §§ 701-766 (1988); J.A. 141-42.

[5] *See* Section 721 of the Bankruptcy Code, 11 U.S.C. § 721 (1988).

[6] Petitioner testified that FERC in fact issued one such license effective August 1, 1987 and licenses for three additional sites effective December 1, 1987. J.A. 96-97, 142.

17-20. On October 2, 1987, the bankruptcy court granted petitioner's petition to convert his case to chapter 11; discharged the trustee (including apparently any responsibilities in connection with the proposed sale of petitioner's IEC shares); permitted the petitioner to manage his own affairs as a so-called debtor-in-possession; and ordered the petitioner, among other things, to file a chapter 11 statement of financial affairs, a disclosure statement and a plan of reorganization. J.A. 21-23.[7]

On October 20, 1987, petitioner filed his statement of financial affairs, including the required schedules of his assets and liabilities. These schedules, as supplemented by an amendment executed February 1, 1988, reflect that petitioner had debts totalling $141,819.97, of which $137,619.34 consisted of unsecured claims without priority and $4200.63 consisted of a priority tax claim[8] which petitioner listed as disputed. Pet. App. 23; J.A. 39, 64. Petitioner also listed $1,170.00 in exempt property.[9] J.A.

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[7] Section 521(1) of the Bankruptcy Code requires a debtor to "file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1) (1988). *See also* Section 1112(e) of the Bankruptcy Code, 11 U.S.C. § 1112(e) (1988) (requiring chapter 11 debtors to file the information required by 11 U.S.C. § 521(1)). Section 1121 of the Bankruptcy Code permits the debtor to file a plan of reorganization. 11 U.S.C. § 1121 (1988). Section 1125(b) requires court approval, after notice and a hearing, of a written disclosure statement before acceptance or rejection of a plan may be solicited. 11 U.S.C. § 1125(b) (1988).

[8] The order in which claims will be paid from the estate is found in section 507. Certain tax claims are paid pursuant to section 507 (a)(7). 11 U.S.C. § 507 (1988).

[9] In connection with his chapter 7, petitioner had claimed this property to be exempt from the estate pursuant to section 522(b)(2)(A) of the Bankruptcy Code and Section 513.430 of the Missouri Statutes. Section 522(b)(2)(A) permits an individual to exempt from property of the bankruptcy estate "any property that is exempt under . . . state or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located. . . ." At the time he filed his bankruptcy petition, petitioner was domiciled in Missouri. Pursuant to Missouri Revised Statutes § 513.427, Missouri has "opted out" of the federal exemption scheme, and has made available to Missouri debtors only the Missouri exemption list. Petitioner had claimed as exempt property which is included in the Missouri list.

12, 54, 97-98. He also listed "[c]ontingent and unliquidated claims" against the two IEC business associates and his 400-share "interest" in IEC as assets having an unknown dollar value. J.A. 55, 65. His assets thus consisted principally of his 400 shares of IEC stock and the potential causes of action against the two remaining IEC shareholders. J.A. 153-54.

On February 1, 1988, petitioner also filed a Plan of Reorganization (the "Plan") and a Disclosure Statement pursuant to Sections 1121 and 1125(b) of the Bankruptcy Code. The Plan and Disclosure Statement indicated that petitioner had obtained a commitment for an unsecured loan of $25,000, which would be used to fund the Plan. J.A. 75-76, 94.[10] Specifically, petitioner would pay in full all administrative expenses of the bankruptcy case and the priority tax claim—estimated to be in the aggregate amount of approximately $10,000. J.A. 75-76, 91-93. Petitioner would pay the remaining $15,000 on a *pro rata* basis to general unsecured creditors. J.A. 92-93. Petitioner would also pay general unsecured creditors *pro rata*, until the principal amount of their claims had been paid in full, out of a fund composed of 50% of any dividends petitioner received on his IEC shares for a six-year period, 50% of the proceeds of the sale of his IEC stock should he decide voluntarily to sell the stock within that six-year period, and 100% of any amount he receives as a judgment or in settlement of any claim peti-

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[10] The $25,000 loan was proposed to be repaid from petitioner's personal income that he earned subsequent to confirmation of the Plan, including any dividends he received on his IEC shares. J.A. 94.

tioner files against the two remaining IEC shareholders and others. J.A. 75-76, 93-94, 114-15.

The Plan of Reorganization thus offered the possibility of paying unsecured creditors an amount greater than petitioner's creditors would have received in a liquidation under chapter 7.[11] Because petitioner could not receive any litigation or settlement proceeds until his creditors were paid 100% of the principal amount of their claims, the Plan was apparently designed to give petitioner an incentive to prosecute the lawsuit vigorously and to obtain a judgment notice or settlement that would pay in full his unsecured creditors and allow additional recovery to him personally.

On March 8, 1988, without passing on the adequacy of the Disclosure Statement [12] or providing the creditors an opportunity to vote for or against a proposed plan of reorganization, the bankruptcy court *sua sponte* entered an order to show cause why petitioner's chapter 11 case should not be dismissed for petitioner's failure to qualify as a chapter 11 debtor. J.A. 121. The order to show cause was apparently based on the court's concern that petitioner's filing was inconsistent with the Eighth Circuit's decision in *Wamsganz* v. *Boatmen's Bank of DeSoto*,

[11] On March 3, 1988, the bankruptcy court received a letter from one of the two remaining IEC shareholders, offering to pay $50,000 for petitioner's stock and a release of liability from all claims by the petitioner against himself, the second remaining shareholder and other officers, employees, and agents of IEC. J.A. 109-12, 100-02. As the letter required acceptance of the offer within 30 days from its receipt, J.A. 102, the court had no assurance that the $50,000 would be available if the court required conversion of petitioner's case to chapter 7.

[12] The bankruptcy court questioned whether any amendments to the Disclosure Statement were required by the letter referenced in footnote 11 that had been received after the Disclosure Statement was filed. J.A. 118.

804 F.2d 503 (8th Cir. 1980), permitting individuals to reorganize under chapter 11 only if they have businesses. At the hearing on the court's order to show cause, petitioner attempted to show that he had a business to reorganize. His counsel also argued that cases in other circuits have held, contrary to the Eighth Circuit's decision in *Wamsganz*, that chapter 11 is available to individuals not engaged in business. J.A. 151. No creditor appeared at the hearing or filed a pleading with the court in support of a dismissal of petitioner's chapter 11 case. J.A. 4, 122, 124.

On August 1, 1988, the bankruptcy court ruled that petitioner was not eligible for chapter 11 and ordered the dismissal of petitioner's case if he did not reconvert the case to one under chapter 7. The court rejected petitioner's contention that he had a business that could be reorganized pursuant to chapter 11.[13] Pet. App. 27-28. The court also held that the Eighth Circuit's rule in *Wamsganz* required it to dismiss the chapter 11 cases of individuals who did not have businesses, stating:

> Chapter 11 was designed to affect business rehabilitation and therefore "persons not engaged in business may not seek relief under chapter 11 of the Bankruptcy Code." This court must apply the position of the *Wamsganz* Court with respect to chapter 11 eligibility.

Pet. App. 24.

The United States District Court for the Eastern District of Missouri affirmed without specifically discussing petitioner's argument that chapter 11 is available to in-

[13] In the bankruptcy court, petitioner testified that he was attempting to reorganize his business as an energy consultant and that he also had earned money in a separate business as a private charitable fundraiser. J.A. 143-145. The bankruptcy court found these activities did not constitute "businesses" permitting reorganization under chapter 11 of the Bankruptcy Code. Pet. App. 24-25. Petitioner does not challenge the sufficiency of that finding in this Court.

dividual debtors who are not engaged in business. Pet. App. 9-16. The Eighth Circuit also affirmed, concluding in a brief opinion that:

> the Bankruptcy Court did have authority to dismiss the proceeding *sua sponte*, and that the Bankruptcy Court was controlled by *Wamsganz*, 804 F.2d 503. We can also find no error in the Bankruptcy Court's finding that Mr. Toibb did not qualify as a business entitled to chapter 11 protection.

Pet. App. 5.[14]

In view of a conflict in the circuits,[15] this Court granted the petition for certiorari on January 18, 1991.

SUMMARY OF ARGUMENT

I. Section 109(d) of the Bankruptcy Code states that any "person" eligible to be a debtor under chapter 7, with certain inapplicable exceptions, is eligible for chapter 11. There is no question that petitioner is eligible for chapter 7. Section 109(b) states that any "person," with certain inapplicable exceptions, is eligible for chapter 7. A "person" under section 101(37) is defined as an "individual, partnership or corporation," other than certain governmental entities. The plain meaning of these words is that, with certain inapplicable exceptions, all individuals are eligible for chapter 7, and ergo chapter 11 relief. When the language of an act is clear, as it is in this case, such language is to be given effect, without the necessity of further inquiry.

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[14] The Eighth Circuit denied petitioner's petition for rehearing *en banc* in which he asked the court to reexamine its decision in *Wamsganz* in light of the decisions in other circuits "that nonbusiness individual debtors are eligible for chapter 11." J.A. 177-78.

[15] The Eleventh Circuit held in *In re Moog*, 774 F.2d 1073 (1985) (per curiam), that consumer debtors could seek relief under chapter 11. *Moog* relied on the absence from the eligibility section for chapter 11 of any requirement that the debtor be engaged in an ongoing business, 774 F.2d at 1075, and on the legislative history to the Bankruptcy Code. 774 F.2d at 1074.

II. Chapter 11 represents a consolidation of chapter XI of the Bankruptcy Act and two other chapters. Nonbusiness individuals were eligible for relief under former chapter XI. Because Congress was aware of the practice and did not expressly, or even impliedly, indicate an intent to reverse this practice by preventing nonbusiness individuals from seeking chapter 11 relief, a business requirement should not be read into section 109(d). Congress knew how to limit eligibility for different forms of bankruptcy relief, and failed to do so here.

III. Furthermore, the legislative history to the Bankruptcy Code reveals that Congress expressly intended to make chapter 11 available to nonbusiness individuals. The Senate Report specifically stated that chapter 11 "permits individuals to use this chapter," and the House Report plainly contemplates that consumers would be eligible to use chapter 11.

IV. Petitioner's eligibility for chapter 11 relief is also consistent with the scheme of the Bankruptcy Code and with the policy underlying chapter 11. The Code's structure generally permits debtors to select between two or more chapters under which to file. Each chapter provides different advantages and disadvantages to a debtor. Congress left it to each debtor to analyze his situation and select the chapter which best suits his needs. Finally, permitting individual nonbusiness debtors to reorganize under chapter 11 fulfills the underlying policy of encouraging reorganizations over liquidations.

ARGUMENT

Petitioner is eligible for relief under chapter 11 for four reasons. First, the plain language of the Bankruptcy Code makes all persons, including individuals, eligible to be debtors under chapter 11. Second, chapter 11 represents the consolidation of three prior reorganization provisions, one of which was available to individual debtors not engaged in business, and there is no indication that Congress intended to change that element of the prior chapter. Accordingly, it should be presumed that Congress intended to maintain such eligibility in the new chapter 11. Third, the legislative history indicates that Congress intended that nonbusiness individuals would continue to be eligible for reorganization under chapter 11. Finally, permitting individual debtors without businesses to seek chapter 11 relief is consistent both with the structure of the Bankruptcy Code and the policy underlying chapter 11.

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE MAKES PETITIONER ELIGIBLE FOR RELIEF UNDER CHAPTER 11

It is well settled that unambiguous statutory language must be accepted as conclusive "in the absence of a 'clearly expressed legislative intent to the contrary.'" [16] Here, the Court should reverse because the statutory language unambiguously gives all individuals the right to proceed under chapter 11 and, as we discuss below, far from evincing a contrary intent, the legislative history supports the proposition that any individual, whether or

[16] *United States v. Turkett*, 452 U.S. 576, 580 (1981). *Accord Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 379-80 (1988).

not engaged in business, is eligible for relief under chapter 11.[17]

The relevant statutory language is contained in section 109(d), which states that any "person" eligible to be a debtor under chapter 7, with certain exceptions not relevant here, is qualified to be a debtor under chapter 11.[18] There is no question that petitioner is eligible for chapter 7. Indeed, the Bankruptcy Court sought to force petitioner to utilize chapter 7, and it is quite clear that he qualifies for that chapter. Section 109(b) provides that any "person" may be a debtor under chapter 7, again with certain exceptions not pertinent here.[19] The

[17] This Court has also held in a long line of cases that when the language of an act is clear, as here, that language must be given effect without regard to extraneous evidence of legislative intent. *E.g., United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 395-396 (1868); *Caminetti v. United States*, 242 U.S. 470, 489-490 (1917); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Central Trust Co., Rochester, N.Y. v. Official Creditors' Committee of Geiger Enterprises*, 454 U.S. 354, 359-360 (1982) (per curiam); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-453 (1987) (Scalia, J., concurring). An exception to this general rule is where the literal application of the statute would yield an "absurdity," *United States v. Hartwell*, 73 U.S. (6 Wall.) at 396, or a result "plainly at variance with the policy of the legislation as a whole." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) (citation omitted); *accord United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-243. This exception does not apply here. *See* Point IV *infra*.

[18] 11 U.S.C. § 109(d) (1988) (providing that stockbrokers and commodity brokers may not be, and railroads may be, chapter 11 debtors).

[19] 11 U.S.C. § 109(b) (1988). The "persons" who may not be chapter 7 debtors are railroads, insurance companies, banks, savings banks, savings and loan associations, building and loan associations, homestead associations and credit unions, whether such entities are domestic or foreign and doing business in the United States; and domestic "industrial bank[s] or similar institution[s] which [are] insured bank[s] as defined in Section 3(b) of the Federal Deposit Insurance Act . . . ." *Id.*

word "person" is defined in section 101(37) to mean an "individual, partnership or corporation," other than certain governmental entities.[20] The plain meaning of these words is that, with a few exceptions not relevant here, an individual who is eligible to be a debtor under chapter 7, such as petitioner, is also eligible to be a debtor under chapter 11.

Congress knew well how to limit eligibility under the Bankruptcy Code when it chose to do so. Chapter 13 is expressly limited to certain "individuals";[21] chapter 9 is only available to municipalities;[22] and only farmers are eligible for relief under chapter 12.[23] Even chapter 11 itself expressly excludes certain classes of persons, such as stockbrokers and commodity brokers (and expressly includes railroads, which are ineligible under chapter 7).[24] Congress also knew how to distinguish individuals engaged in business from consumers when necessary, as in section 1304 which specifically defines what constitutes being engaged in business for the purpose of defining the rights and duties of the debtor and the trustee in a chapter 13 proceeding.[25] What is striking here is the absence from the language of section 109(d), which determines eligibility for chapter 11, of even a hint of an intent to bar individual debtors not engaged in business, despite Congress's carefully crafted limitations on eligibility for other debtors.

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[20] 11 U.S.C. § 101(37) (1988) *as amended by* Pub.L. No. 101-647 (November 25, 1990).

[21] 11 U.S.C. § 109(e) (1988). *See* text at note 64 *supra* for a description of these limitations.

[22] 11 U.S.C. § 109(c) (1988).

[23] 11 U.S.C. § 109(f) (1988).

[24] 11 U.S.C. § 109(d) (1988).

[25] 11 U.S.C. § 1304 (1988); *see also* 11 U.S.C. § 1302(c) (1988).

II. CONGRESS DID NOT INTEND TO REVERSE THE PRACTICE UNDER CHAPTER XI OF THE BANKRUPTCY ACT OF PERMITTING NONBUSINESS DEBTORS TO REORGANIZE

This Court has held that "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[26] This rule applies with "particular care in construing the scope of bankruptcy codifications."[27] Here, the practice under the predecessor provisions to chapter 11 was to permit nonbusiness individual debtors to reorganize. In the absence of any "congressional intent to depart from [prior judicial] practice,"[28] it should be presumed that Congress intended to continue that practice in the codification of chapter 11 and that Congress intended that chapter 11 be made available to nonbusiness individual debtors.

Chapter 11 represents the consolidation of three reorganization provisions of the prior Bankruptcy Act.[29] Those provisions were, respectively, former chapter X,[30]

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[26] *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986) (restrictions on judicially-created abandonment power held included in subsequent codification of that power). *Accord Pennsylvania Dep't of Public Welfare v. Davenport*, 110 S. Ct. 2126, 2133 (1990) ("We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.").

[27] *Midlantic National Bank*, 474 U.S. at 501.

[28] *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 208 (1983).

[29] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 9 (1978) [hereinafter cited as S. Rep.], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5897, 5795; H.R. Rep. No. 595, 95th Cong., 1st Sess. 223 (1977) [hereinafter cited as H.R. Rep.], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6182.

[30] Bankruptcy Act §§ 101-276, 11 U.S.C. §§ 501-676 (1976) (repealed 1979). Former chapter X was designed for the reorganization of large companies, with widely dispersed ownership, a sig-

which provided for the reorganization of public companies, former chapter XI,[31] which provided for the reorganization of corporations, partnerships, and individuals, and former chapter XII,[32] which provided for the reorganization of certain noncorporate real estate entities.[33] Former chapter X was the only one of these pre-Code provisions that clearly excluded individuals.[34] While it may have been unusual for individuals not engaged in business to seek protection under former chapter XI, such relief was expressly contemplated by the Rules governing bankruptcy procedure under the Bankruptcy Act and was an accepted and noncontroversial practice.

The relationship between the Rules in effect under the Bankruptcy Act and former chapters XI and XIII provides the clearest evidence that individuals not engaged in business were eligible for relief under chapter XI. Those Rules contemplated that chapter XI was available to debtors who had filed under chapter XIII, and chapter XIII was only available to wage earners. Rule 11-3 thus provided that "[t]he petition under chapter XI may be an original petition or it may be filed in a bankruptcy, chapter XII, or chapter XIII case."[35] Because a peti-

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nificant level of publicly held securities, and a need to modify secured debts. *See SEC v. United States Realty & Improvement Company*, 310 U.S. 434 (1940).

[31] Bankruptcy Act §§ 301-399, 11 U.S.C. §§ 701-799 (1976) (repealed 1979).

[32] Bankruptcy Act §§ 401-526, 11 U.S.C. §§ 801-926 (1976) (repealed 1979).

[33] *See generally* H.R. Rep., *supra* note 29, at 220-223, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6179-183.

[34] Bankruptcy Act §§ 106(3), (5) and 126, 11 U.S.C. §§ 506(3), (5) and 526 (1976) (repealed 1979).

[35] Chapter XI Rule 11-3. *See also* chapter XI Rule 11-7, which stated in pertinent part:

> If a bankruptcy case or a case under chapter XII or XIII is pending by or against the debtor, any petition under chapter XI shall be filed therein and may be filed before or after adjudication.

tion for relief under chapter XIII could be filed only by a "debtor,"[36] which chapter XIII defined as a "wage earner who filed a petition under this chapter,"[37] and chapter XIII defined a "wage earner" as "an individual whose principal income is derived from wages, salary or commissions."[38] Individuals with businesses were not eligible for relief under chapter XIII.[39] In permitting debtors already engaged in a chapter XIII proceeding to commence a chapter XI case, the chapter XI Rules contemplated that chapter XI would be available to individuals without businesses.

Further evidence that the Bankruptcy Act contemplated chapter XI filings by individual nonbusiness debtors is found in the provision which prohibits filing an involuntary chapter XI against certain wage earners.[40] "Wage earner" for this purpose was defined as "an individual who works for wages, salary or hire, at a rate of compensation not exceeding $1,500 per year."[41] It is highly unlikely that any debtors who qualified as wage earners under this section would have also been engaged in busi-

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[36] Bankruptcy Act §§ 621, 622, 11 U.S.C. §§ 1021, 1022 (1976) (repealed 1979).

[37] Bankruptcy Act § 606(3), 11 U.S.C. § 1006(3) (1976) (repealed 1979).

[38] Bankruptcy Act § 606(8), 11 U.S.C. § 1006(8) (1976) (repealed 1979). Corporations and partnerships were not eligible for chapter XIII relief.

[39] R. Jordan & W. Warren, *Bankruptcy* 661 (2d ed. 1989).

[40] Bankruptcy Act § 379, 11 U.S.C. § 779 (1976) (repealed 1979).

[41] Bankruptcy Act § 1(32), 11 U.S.C. § 1(32) (1976) (repealed 1979).

[42] *See* Herbert, *Consumer Chapter 11 Proceedings*, 91 Com. L.J. 234, 241 (1986).

ness.[42] Non-affluent wage earners who were not engaged in business would not have needed protection against involuntary chapter XI proceedings unless it were the case that they were *otherwise* eligible for chapter XI.[43]

The courts also assumed in pre-Code cases that the former Bankruptcy Act permitted individuals without businesses to file under chapter XI.[44] Finally, contemporary commentators assumed that chapter XI would be

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[43] The legislative history of the Bankruptcy Code also reflects Congress's understanding that nonbusiness individuals were eligible to recognize under the former chapter XI. In explaining why eligibility for chapter 13 should be expanded to include small, self-employed businessmen, the House Report recognized that individuals, whether in business or not, were then eligible for former chapter XI. The report states:

> Even individuals whose primary income is from investments, pensions, social security, or welfare may use chapter 13 if their income is sufficiently stable and regular. The expansion of eligibility will enable many to work out arrangements with their creditors rather than seeking straight bankruptcy liquidation. *Under current law [the Bankruptcy Act], they are constrained to use Chapter XI, Arrangements,* which is too cumbersome a procedure for the small, self-employed businessman.

H.R. Rep., *supra* note 29, at 119, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6080 (emphasis added) (footnotes omitted). One of the purposes of chapter 13 was thus to give wage earners an alternative to reorganization under the former chapter XI and its successor, chapter 11.

[44] In *White v. Board of Trade of the City of Chicago*, 492 F.2d 871 (7th Cir. 1974), the debtor was permitted to reorganize even though he apparently had no business to reorganize. Having surrendered his membership in the Board of Trade prior to the commencement of the chapter XI case, he no longer had this membership to claim as a business. In *Stolkin v. Nachman*, 472 F.2d 222 (7th Cir. 1973), the debtor was not regularly employed, although he had accumulated substantial assets as an investor. Neither debtor owned or operated a "business" in the sense of an ongoing enterprise with assets and liabilities (although the debtor in *White*, like the petitioner here, may have had a business before bankruptcy). *See also* Herbert, *supra* note 42, at 241.

available to nonbusiness debtors. In the last pre-Code edition of *Collier on Bankruptcy*, the authors wrote: A wage earner . . . may also file a petition for relief under chapter XI, as clearly recognized in section 379 [of the Act], even though other debtor relief chapters under the Act are available to him." [45]

Against this backdrop, Congress consolidated the three reorganization provisions of the Bankruptcy Act, including former chapter XI, into chapter 11 of the Bankruptcy Code. Neither the Bankruptcy Code nor the legislative history contains any indication that Congress sought to change the practice under the Bankruptcy Act permitting individuals not engaged in business to reorganize under former chapter XI. Absent a clear indication of congressional intent to the contrary, it must be presumed that when Congress created chapter 11 out of chapters X, XI and XII it did not intend to make any change in the accepted interpretation that individual nonbusiness debtors were eligible for reorganization under chapter XI.[46]

III. THE LEGISLATIVE HISTORY EVINCES CONGRESS'S INTENT TO MAKE ALL INDIVIDUALS ELIGIBLE FOR CHAPTER 11

The legislative history confirms that, in continuing the practice of permitting individuals without businesses to reorganize under former chapter XI, Congress did so

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[45] 9 J. Moore & L. King, *Collier on Bankruptcy* ¶ 10.15 at 589 (14th ed. 1978) (footnote omitted).

[46] The fact that former chapter X was not available to individuals without businesses is hardly significant. Indeed, former chapter X was a chapter that proved unsatisfactory and was rarely utilized. *E.g.*, R. Jordan and W. Warren, *supra* note 39, at 723 (describing chapter X as "virtually a dead letter" by the eve of the passage of the new Bankruptcy Code). And, as discussed below, there is no indication in the legislative history that Congress sought to do away with what had been available to such individuals in former chapter XI.

advertently and intended to make chapter 11 of the new Bankruptcy Code available to all individuals.[47]

The Senate Report expressly states that individuals are permitted to seek relief under chapter 11:

> Chapter 11, Reorganization, is primarily designed for businesses, but permits individuals to use the chapter. The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context.[48]

The House Report contains language to the same effect.[49] In short, although Congress assumed that consumers would not avail themselves of the opportunity to reorganize under chapter 11 in light of the complexity and expense entailed in such proceedings, it expressly acknowledged that chapter 11 would be available to individuals.

Nor is there any evidence that Congress sought to distinguish between individuals engaged in business and consumers. On the contrary, the House Report states that "[t]hough this report is divided between consumer debtors and business debtors, the bill itself makes no distinction."[50] The fact that the legislative history addresses in much greater detail the problems of reorganizing businesses[51] merely reflects the fact that Congress anticipated that few consumers would use chapter 11.[52]

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[47] *See* Herbert, *supra* note 42, 238.

[48] S. Rep., *supra* note 29, at 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5789.

[49] H.R. Rep., *supra* note 29, at 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5792.

[50] *Id.*

[51] *See, e.g.*, S. Rep., *supra* note 29, at 9, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5795.

[52] The numerous references in chapter 11 to actions to be taken with respect to a debtor's business, *e.g.*, 11 U.S.C. §§ 1103(c)(2), 1106(a)(3) (1988), reflect merely the fact that most chapter 11 proceedings involve businesses. Similarly, chapter 7, which is undeniably available to nonbusiness debtors, also contains numerous references to actions to be taken with respect to a debtor's business. *E.g.*, 11 U.S.C. §§ 704(8), 721 (1988).

The House Report also expressly contemplated the availability of chapter 11 to "wage earners," who are defined as persons "whose principal income is derived from wages, salary or commissions."[53] In describing a change from the predecessor to chapter 13, the report states:

> Under current law [the predecessor to chapter 13], only a "wage earner" . . . may file a chapter XIII case. This limitation unnecessarily excludes small businessmen from the cheap and expeditious remedy of a wage earner plan. The distinction between a barber, grocer and worm digger who is self-employed from one who is an employee is slight. *H.R. 8200 eliminates the distinction in order to offer small sole proprietors as well as wage earners an alternative to Chapter 11.*[54]

In recognizing that the House bill gave "wage earners an alternative to chapter 11," the report necessarily also acknowledged that chapter's availability to persons without a business.

To sum up, the legislative history demonstrates in several places Congress's understanding that chapter 11 would continue to be available to all individuals, including those not engaged in business. Even if the legislative history can somehow be viewed as less than conclusive, it can hardly be said to evidence a clear legislative intent to bar individuals not engaged in business from seeking relief under chapter 11. Accordingly, there is no basis for this Court to "question the strong presumption that Con-

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[53] H.R. Rep., *supra* note 29, at 118-19, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6079.

[54] *Id.* (emphasis added) (footnotes omitted).

gress expresses its intent through the language it chooses." [55]

IV. PERMITTING NONBUSINESS INDIVIDUAL DEBTORS TO SEEK CHAPTER 11 RELIEF IS CONSISTENT WITH BOTH THE STRUCTURE OF THE BANKRUPTCY CODE AND THE POLICY UNDERLYING CHAPTER 11

Chapter 11 relief for individual nonbusiness debtors is consistent with both the structure of the Bankruptcy Code and its underlying policies. The Code provides several avenues of relief, each of which presents certain advantages and disadvantages, and leaves it to the debtor to pick the course most advantageous to him. Moreover, depriving nonbusiness debtors of the opportunity to seek chapter 11 relief would frustrate a key policy of the Bankruptcy Code, namely, to permit debtors to reorganize where they are worth more on a going-concern than a liquidation basis.

A. Chapter 11 Relief for Nonbusiness Individual Debtors Is Consistent With the Structure of the Bankruptcy Code

Permitting nonbusiness individual debtors to seek relief under chapter 11 is entirely consistent with the structure of the Bankruptcy Code. Structurally, the Code consists of several chapters that provide different advantages and disadvantages.[56] Where a debtor is eligible for relief under more than one chapter, Congress left it to the debtor to weigh the economics involved and to select the

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[55] *INS v. Cardoza-Fonseca*, 480 U.S. at 432 n.12.

[56] The fundamental difference between a liquidation under chapter 7 and a reorganization under chapter 11 or chapter 13 is that in a liquidation, the debtor's non-encumbered, non-exempt assets, are reduced to cash and distributed to creditors, *see* text at note 58, *infra*, while in a reorganization the debtor retains all or some of his assets and pays his debts, which may be extended or reduced, primarily out of future cash flow, *see* text at notes 66 and 71 *infra*.

remedy that best fits the debtor's particular facts.[57] The fact that chapter 11 may provide certain advantages that chapters 7 and 13 do not is simply part of the calculus that must be performed by the debtor.

As we noted above, chapter 7 is broadly available to both individuals and entities. In a chapter 7 liquidation, a trustee is appointed to liquidate the assets [58] of the debtor and to distribute the proceeds to creditors in the priority specified by the Code.[59] At the conclusion of a liquidation under chapter 7, the debtor is given a discharge of all pre-filing debts,[60] except for certain non-dischargeable debts.[61] A debtor cannot obtain a discharge under chapter 7 if he has previously received a discharge in a case commenced within six years of the filing of the petition.[62] If his creditors meet certain statutory prerequisites, they can force the debtor into an involuntary liquidation under chapter 7.[63]

Chapter 13 provides for the reorganization of certain individuals with limited debts. Specifically, only individ-

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[57] *In re Silva*, 82 Bankr. 845, 846-847 (Bankr. S.D. Ohio 1987); *In re Ross*, 95 Bankr. 509, 510 (Bankr. S.D. Ohio 1988).

[58] Under section 522 of the Bankruptcy Code, certain property owned by the debtor is "exempt." Exempt property cannot be liquidated and sold for the benefit of unsecured creditors. 11 U.S.C. § 522 (1988).

[59] 11 U.S.C. §§ 704, 726 (1988).

[60] 11 U.S.C. § 727(a) (1988).

[61] 11 U.S.C. § 523 (1988). A variety of debts are not dischargeable under chapter 7, including certain tax obligations; debts for money obtained by false pretenses; alimony obligations; liabilities for fraud, embezzlement or larceny; liabilities for intentional torts; and fines or penalties owed to the government. 11 U.S.C. § 523(a) (1988).

[62] 11 U.S.C. § 727(a)(9) (1988).

[63] 11 U.S.C. § 303 (1988).

uals (and not corporations or partnerships) who have regular income and who have liquidated, unsecured debts of less than $100,000 and liquidated, secured debts of less than $350,000, may become debtors under chapter 13.[64] With limited exceptions, debts that are nondischargeable under chapter 7 *are dischargeable* under chapter 13.[65] In a chapter 13 proceeding, the debtor retains his assets and pays his debts out of future earnings pursuant to a plan that must be confirmed by the court.[66] Creditor approval is not required for confirmation of a chapter 13 plan, but the unsecured creditors' recovery must be at least equal to any alternative recovery under a chapter 7 liquidation.[67] A standing trustee oversees all of the chapter 13 cases in a particular district, and performs many of the same functions as a chapter 7 trustee.[68] Unlike a chapter 7 trustee, however, the standing trustee does not take possession of the debtor's property or business.[69]

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[64] 11 U.S.C. § 109(e) (1988).

[65] 11 U.S.C. § 1328 (1988), *as amended by* Pub. L. No. 101-508 (November 5, 1990) and Pub. L. No. 101-647 (November 29, 1990). As in chapter 7, alimony obligations are not dischargeable in chapter 13. 11 U.S.C. § 1328(a)(2) (1988).

[66] *See generally* R. Jordan & W. Warren, *supra* note 39 at 671. The chapter 13 plan cannot exceed five years in length. 11 U.S.C. § 1322(c) (1988).

[67] U.S.C. § 1325(a)(4) (1988). Moreover, the court can approve a chapter 13 plan over the objection of an unsecured creditor when the unsecured creditor is to receive under the plan full payment of its claim, 11 U.S.C. § 1325(b)(1)(A), or all of the debtor's disposable income, 11 U.S.C. § 1325(b)(1)(B). An objecting secured creditor is entitled either to retain the lien securing its claim or to obtain possession of the collateral securing its claim. 11 U.S.C. § 1325(a)(5) (1988).

[68] *See* 3 L. King, *Collier Bankruptcy Manual*, ¶ 1302.03, at 1302-4 (3d ed. 1990); 28 U.S.C. § 586 (1988), *as amended* by Pub. L. No. 101-509 (November 5, 1990).

[69] 11 U.S.C. §§ 1304, 1306(b) (1988).

Chapter 11 is available to any "person" who is eligible for liquidation under chapter 7, except for a stockbroker or commodity broker, plus any railroad.[70] In a chapter 11 proceeding, the debtor usually retains possession of his assets, although a trustee can be appointed.[71] Moreover, an unsecured creditors' committee must be appointed as soon as practical after the petition is filed.[72] The debtor has the exclusive right for 120 days to propose a reorganization plan.[73] After due disclosure is made,[74] creditors whose claims or interests would be impaired[75] by the plan have the right to vote by class on the plan.[76] The plan can be confirmed if approved by the requisite number of claimants possessing the requisite amount of claims within each class.[77] If a class dissents,

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[70] 11 U.S.C. § 109(d) (1988).

[71] *See* 11 U.S.C. § 1104(a). Trustees are seldom appointed in chapter 11, because there is a basic presumption that the debtor-in-possession knows its affairs better than anyone. If a trustee is appointed, its job will be to run the debtor's affairs and presumptively not to liquidate the debtor's assets.

[72] 11 U.S.C. § 1102(a) (1988).

[73] *See* 11 U.S.C. § 1121(b) (1988).

[74] Pursuant to 11 U.S.C. § 1125 the debtor-in-possession must file a disclosure statement.

[75] A class of claims or interests is "impaired" when the legal, equitable or contractual rights of the members of the class are altered. 11 U.S.C. § 1124 (1988).

[76] An impaired class of claims accepts the plan if at least two-thirds in amount and more than one-half in number of the allowed claims in the class that are actually voted are cast in favor of the plan. An impaired class of interests accepts the plan if at least two-thirds in amount of the allowed interests in the class that are actually voted are cast for the plan. *See* 11 U.S.C. § 1126(c)-(d) (1988). A class that is not impaired under a plan is conclusively presumed to have accepted the plan. 11 U.S.C. § 1126(f) (1988).

[77] 11 U.S.C. §§ 1126(c) and 1129(a)(8) (1988).

the court may nonetheless approve the plan if the "cram-down" provisions of section 1129 are met. An important requirement to cramming down a plan is that each dissenting creditor must receive at least as much as it would in a chapter 7 liquidation.[78] Another important cram-down requirement is the "absolute priority" rule, which requires that before any junior claim is paid at all, claims that are senior to it must be paid in full.[79] Confirmation of a chapter 11 plan results in most cases in a discharge of the same types of debts that are dischargeable in a chapter 7 liquidation.[80]

A court may reject a chapter 11 plan submitted in bad faith[81] and for cause may dismiss or convert the proceeding to a chapter 7 liquidation.[82] Cause includes any determination by the court that there is a continuing loss to the estate and an absence of a reasonable likelihood of rehabilitation or that the debtor is unable to effectuate a plan of reorganization.[83]

To summarize, chapter 7 offers to debtors the advantages of speed and minimal cost, although it results in the loss of nonexempt assets; chapter 13 offers debtors the broadest discharge of debts[84] and the ability of the

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[78] 11 U.S.C. § 1129(a)(7) (1988); *see generally* 2 L. King, *Collier Bankruptcy Manual*, ¶ 1100.01, at 1100-20 to 1100-23 (3d ed. 1990).

[79] *See* 11 U.S.C. § 1129(b)(2)(B) (1988).

[80] Chapter 11 debtors are subject to the nondischargeability provisions of sections 523 and 727(a) of the Bankruptcy Code. 11 U.S.C. §§ 1141(d)(2) & (3) (1988).

[81] 11 U.S.C. § 1129(a)(3) (1988); *see* 2 L. King, *supra* note 78, ¶ 1112.04, at 1112-29 to 1112-36.

[82] 11 U.S.C. § 1112(b) (1988); *see* 2 L. King, *supra* note 78, ¶ 1112.04, at 1112-17 to 1112-22.

[83] 11 U.S.C. § 1112(b) (1988).

[84] For example, a chapter 13 debtor who successfully completes a plan can receive a discharge of obligations arising out of fraud,

debtor to retain possession of his property without a creditors' committee overseeing the reorganization, although it is only available for some individuals with limited debts and requires payment of all disposable income into the debtor's plan; and chapter 11 offers debtors both the ability to maintain possession of the bankruptcy estate and greater flexibility in structuring a plan of reorganization, although it entails some additional delay and expense in connection with disclosure to creditors and administration of the creditors' committee and, except in the case of a "cram-down" plan, requires creditor approval for confirmation of a plan.[85]

Only in limited circumstances will it be more advantageous for an individual debtor without an ongoing business to pursue a chapter 11 reorganization. Most individual debtors will seek relief under chapters 7 or 13 due to the additional cost and complexity of chapter 11.[86] Still, some individual debtors, like petitioner, will prefer chapter 11. While it is difficult to generalize, chapter 11 may be in the best interests of an individual nonbusiness debtor and his creditors where the debtor is willing and able to inject fresh cash into the plan, or is not eligible for chapter 13,[87] or has some asset such as petitioner's

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see Pennsylvania Dep't. of Public Welfare v. Davenport, 110 S.Ct. 2126, 2134 (1990), or intentional torts, *see In re LeMaire*, 883 F.2d 1373, (8th Cir. 1989) *reh'g granted, vacated* 891 F.2d 650, *on reh'g*, 898 F.2d 1346, 1348 (1990). *See* 11 U.S.C. § 1328(a) (1988). In chapters 7 and 11 obligations arising from fraud and intentional torts are not dischargeable. 11 U.S.C. § 523(a)(6) (1988).

[85] *See* Herbert, *supra* note 42, at 240. For a more detailed discussion of the differences between chapters 7, 11 and 13, *see generally* Note, *Individual Consumer Debtors Are Eligible For Chapter 11 Relief*, 1988 Ill. L. Rev. 785, 786-790.

[86] *See, e.g.*, Herbert, *supra* note 42, at 238-239; Note, *supra* note 85, at 788.

[87] Even if chapter 13 is available, chapter 11 offers considerably more flexibility in formulating a plan, and depending on the facts and circumstances, the debtor and his creditors may conclude that such flexibility is needed to achieve the greatest possible recovery.

causes of action which may yield a substantial future recovery but cannot be expeditiously liquidated by a chapter 7 trustee for its present value.

The fact that chapter 11 is "primarily designed for businesses" [88] and the perhaps limited role that chapter 11 may have for individual debtors who are not engaged in an ongoing business in no way implies that it has no role to play. To the contrary, to bar nonbusiness individual debtors from chapter 11 would leave a lacunae in the Code that makes no sense. If individuals with substantial debts who are not engaged in business are barred from chapter 11, then their only remedy will be liquidation under chapter 7 which may well, as in this case, yield less value for creditors than reorganization.

Nor can the dollar limits on eligibility in chapter 13 be said to reflect some desire on Congress's part to provide an exclusive reorganization remedy for consumer debtors. Individuals with substantial debts were made ineligible for relief under chapter 13 in order "to make chapter 13 available to most consumer debtors and many small business debtors, leaving to chapter 11 cases involving larger amounts of debt." [89] The only reason that Congress believed that large debtors should not be permitted to proceed under chapter 13 was because of the weakened protections for creditors under chapter 13 [90] compared to those available under chapter 11.[91] Thus, the fact that

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[88] S. Rep., *supra* note 29, at 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 5789.

[89] R. Jordan & W. Warren, *supra* note 39, at 671.

[90] For example, chapter 13, unlike chapter 11, neither requires the debtor to file a comprehensive disclosure statement nor provides for an unsecured creditor's committee to oversee the case. 11 U.S.C. § 1301 *et seq.* (1988).

[91] As stated in the House Report:

> The bill places dollar limitations on the amount of debts of the proprietor who may use chapter 13, in order to prevent sole proprietors with large businesses from abusing creditors by avoiding chapter 11.

H.R. Rep., *supra* note 29, at 119, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6080.

individuals with substantial debts, such as petitioner, are ineligible for chapter 13 reflects not an intent to force such individuals into liquidation but rather Congress's belief that any reorganization of such debtors should proceed under chapter 11.

B. No Policy Bars Nonbusiness Individual Debtors From Seeking Relief Under Chapter 11

The basic premise of chapter 11 is that a debtor may be worth more on a going forward basis than in liquidation.[92] In the business context, this may be because "assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap." [93] However, it is equally true that in the nonbusiness context, certain assets (such as the causes of action and shares owned by petitioner) may yield more value for creditors if managed or vigorously pursued by a debtor-in-possession in a reorganization case than if liquidated by a trustee in a fire sale. In either the business or nonbusiness context, the result in a successful reorganization is that creditors (and potentially the equity interests) will receive more value than they would otherwise receive in a liquidation.[94] In-

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[92] *See generally* H.R. Rep., *supra* note 29, at 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6179.

[93] *Id.* A successful reorganization of a business will also preserve jobs. *Id.*

[94] One of the prerequisites for confirmation of a reorganization plan under chapter 11 is that all impaired holders must either accept the plan or receive not less than the amount they would receive under a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7) (1988). In practice, holders cannot be expected to vote in favor of a plan unless they believe that their recovery will be at least as favorable as in a liquidation.

deed, the benefits of reorganization are so great that Congress has even made it impossible to waive the right to convert a chapter 7 liquidation proceeding to a reorganization under chapters 11, 12 or 13.[95] It is consistent with both the letter and spirit of the Code that nonbusiness individual debtors who are able to satisfy the demanding requirements of chapter 11 be permitted to do so. To hold otherwise would fly in the face of "the congressional goal of encouraging reorganizations." [96]

Finally, permitting individual debtors not engaged in business to seek relief under chapter 11 will not open the floodgates to abusive filings. The courts retain ample power to control any abusive filings that are made. A chapter 11 petition can be dismissed if the court determines, among other things, that it was brought in bad faith, that there is no reasonable likelihood of rehabilitation or that the debtor will be unable to effectuate a plan of reorganization that complies with the Code.[97] Other provisions of the Code ensure that creditors' interests will be protected.[98]

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[95] 11 U.S.C. § 706(a) (1988). *See also* H.R. Rep., *supra* note 29, at 380, *reprinted in* 1978 U.S. Code Cong. & Admin. News, at 6336 ("The policy of [Section 706] is that the debtor should always be given the opportunity to repay his debts.").

[96] *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983).

[97] 11 U.S.C. §§ 1112(b), 1129(a)(3) (1988); *see* 2 L. King, *supra* note 78, ¶ 1112.04 at 1112-17 to 1112-22 and 1112-29 to 1112-36.

[98] No chapter 11 plan can be confirmed over the objection of creditors unless those creditors receive at least the amount they would receive in a liquidation under chapter 7. See *supra* note 94.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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